BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM D. DANIELS	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,813
HUBBARD MILLING COMPANY	)	
Respondent	)	
AND	)	
	)	
ZURICH INSURANCE COMPANY, c/o	)	
GALLAGHER BASSETT SERVICES	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the Award of Administrative Law Judge Bruce E. Moore dated June 30, 1998. Oral argument was held in Wichita, Kansas, on February 12, 1999.

APPEARANCES

Claimant appeared by his attorney, Randall C. Henry of Sterling, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephen J. Jones of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the parties stipulated claimant has a 10 percent functional impairment to the body as a whole, claimant has returned to work at a comparable wage, and work disability is not an issue.

ISSUES

(1) Did claimant suffer accidental injury on the date or dates alleged?

(2) Did claimant's accidental injury or injuries arise out of and in the course of his employment with respondent?

(3) Did claimant provide timely notice of the accident pursuant to K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

After having reviewed the entire evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are accurate and appropriate, and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein.

Claimant began working for respondent through a Manpower employment agency in early 1992. By January 1993, claimant was a full-time employee of respondent, working as a "bagger and sacker." Claimant sacked dog food and placed the sacks on a pallet. The sacks of dog food would range anywhere from 3½ to 50 pounds. Claimant's entire work history involved manual, unskilled labor.

Claimant alleged he began noticing low back pain in January 1996, and went to his chiropractor, Dr. G. A. Carr. Dr. Carr's notes indicate claimant had low back complaints as early as October 1995.

Claimant discussed his low back symptoms with his shift supervisor, Mr. Dale Pitchford, in January 1996. Mr. Pitchford testified to being aware of claimant's ongoing back symptoms, as he had observed claimant on several occasions favoring his back. Mr. Pitchford was concerned about claimant's ongoing back problems, and on several occasions moved claimant to light-duty work of sweeping and straightening up bags and painting.

Mr. Pitchford estimated claimant had been placed on light duty a half a dozen times before April 1996. He admitted claimant did not complain to him about his back, but he could tell by the way claimant was walking and standing that claimant was favoring his back. He testified his motivation for accommodating claimant was, first, to help claimant out and, second, to prevent him from hurting himself worse from the lifting required in claimant's job.

Mr. Richard Pfeifle, respondent's plant manager, also testified at the preliminary hearing. He was aware of claimant's medical history because he had noted claimant was older than the other baggers and, upon investigation, discovered that claimant was on heart and high blood pressure medication. He felt there was a need to keep a special eye on claimant. He had a conversation with Mr. Pitchford during the first two weeks of April about claimant's back problems. He stated claimant never told him of any traumatic event that occurred at work, but he was aware claimant was having problems with his back at work. Both Mr. Pitchford and Mr. Pfeifle acknowledged claimant was placed on light duty as a result of his ongoing back problems.

Claimant testified there was no specific traumatic incident which led to his ongoing back complaints. This was merely a continuous process beginning in January 1996, and continuing through the last day claimant worked, April 26, 1996.

On Sunday, April 28, 1996, claimant arose from a chair and had a sudden increase in pain with radiculopathy down his left leg. Claimant ultimately came under the treatment of Dr. Kris Lewonowski, a board certified orthopedic surgeon. Dr. Lewonowski diagnosed an L4-5 disc herniation with a large disc protrusion at L5-S1 on the left side. After a period of conservative treatment, claimant underwent an L4-5 hemilaminotomy, discectomy and foraminotomy. Claimant went through a period of postoperative treatment, including a functional capacity evaluation and work hardening, and ultimately returned to work with restrictions at a comparable wage. Dr. Lewonowski assessed claimant a 10 percent impairment to the body as a whole as a result of the back injuries. He was asked on both direct and cross-examination whether this injury was related to claimant's work, but declined to comment because he didn't believe claimant gave him that as part of the history. Dr. Lewonowski was unable or unwilling to say, within a reasonable degree of medical probability, whether claimant's accidental injuries arose out of and in the course of his employment with respondent.

Claimant was referred to Dr. C. Reiff Brown, a board certified orthopedic surgeon, for an independent medical examination. Dr. Brown examined claimant on December 18, 1996, at the request of the Administrative Law Judge. He was provided a history of claimant's injuries, and had the opportunity to review the medical examinations and tests, including the MRI scan done on claimant. At the time of the examination, he felt claimant had reached maximum medical improvement, and assessed claimant a 15 percent impairment to the body as a whole on a functional basis pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Dr. Brown opined that it was not possible for someone to suffer the type of injury diagnosed in claimant simply by rising from a chair. There had to be an underlying problem in existence that set the stage in order for such a trivial force to bring about the rupture of a lumbar disc. As noted by the Administrative Law Judge in the Award, Dr. Brown opined that the trivial activity in claimant's kitchen on Sunday, April 28, 1996,

was not the cause of claimant's herniation. Instead, the cause was "his months and years of work activity that immediately preceded this incident, and especially those early months of 1996 during which the nucleus was likely making its progressive peripheral migration through the annulus."

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish his right to an award of compensation, by proving the various conditions upon which his right depends by a preponderance of the credible evidence. K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g). In reviewing the medical evidence and the testimony of claimant, the Appeals Board finds that claimant's work activities did cause him to suffer accidental injury arising out of and in the course of his employment with respondent. The medical testimony of Dr. Brown is particularly persuasive in this regard.

K.S.A. 44-520 obligates a claimant to provide notice of an accident within 10 days of the accident, stating the time and place and particulars thereof. The statute goes on to qualify this obligation, stating that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

In this instance, both claimant's supervisor and the respondent's plant manager witnessed claimant, on several occasions, favoring his back. They were both aware that claimant was substantially older than the other packers, and were concerned about claimant's other medical problems, including his heart condition and high blood pressure. Claimant's supervisor placed him on light duty on several occasions, after observing claimant favoring his back. There was even a conversation between claimant's supervisor and the plant manager about the need to place claimant on light duty.

The Appeals Board finds that whether or not claimant specifically detailed to the respondent a traumatic event is irrelevant in this matter. Respondent had actual knowledge of claimant's ongoing symptoms and displayed sufficient concern with claimant's work activities to place claimant on light duty on several occasions. The Appeals Board, therefore, finds that notice as required by K.S.A. 44-520 was unnecessary as respondent had actual knowledge of claimant's ongoing physical injuries. Therefore, the requirements of K.S.A. 44-520 have been met.

The Appeals Board, therefore, finds that the Award of the Administrative Law Judge granting claimant a 10 percent permanent partial impairment to the body as a whole should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated June 30, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randall C. Henry, Sterling, KS
Stephen J. Jones, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director